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No. \_\_\_\_\_

Supreme Court, U.S.  
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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1989

THE PORTMAN,

*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD and  
INTERNATIONAL UNION OF OPERATING  
ENGINEERS, STATIONARY ENGINEERS,  
LOCAL 39, AFL-CIO,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS FOR  
THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

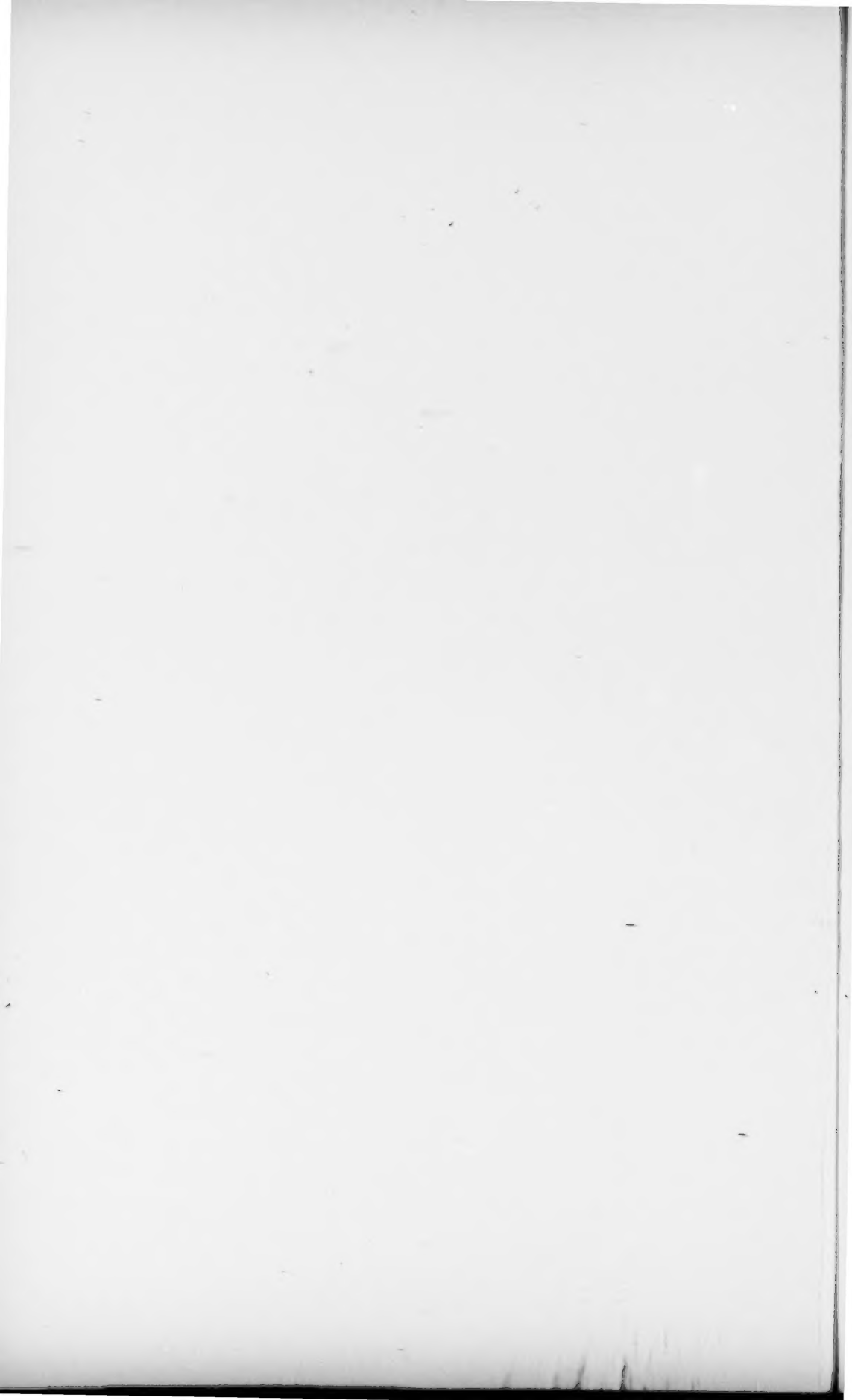
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**QUESTION PRESENTED FOR REVIEW**

**Important Question of Federal Law Addressed to the Supervisory Power of the Court**

Whether the NLRB may make a unit determination in an arbitrary and capricious manner that is not supported by substantial evidence and based on the extent of a union's organizational success thereby violating the due process rights of the employer, to wit:

- A. The unit determination is not supported by substantial evidence in the record as a whole.

- B. The NLRB arbitrarily and capriciously excluded relevant evidence that could have materially affected the determination of an appropriate unit.
- C. The NLRB disregarded established policy by ignoring The Portman's organizational structure and business purpose.
- D. The extent of the union's organizational success was the controlling factor in the determination of an appropriate unit.

#### **LIST OF ALL PARTIES TO THE PROCEEDINGS**

The following is a complete list of all parties to the proceedings in this case.

- (1) Portman Hotel Management Company
- (2) Portman Hotel Company
- (3) International Union of Operating Engineers,  
Stationary Engineers, Local 39
- (4) National Labor Relations Board

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**REFERENCES TO OPINIONS AND ORDERS IN  
COURTS AND ADMINISTRATIVE AGENCIES  
BELOW**

On October 5, 1987, a petition was filed with Region 20 of the National Labor Relations Board [hereinafter referred to as the Board or NLRB] by the International Union of Operating Engineers, Stationary Engineers, Local 39 [hereinafter referred to as the Union]<sup>1</sup> seeking to represent nine employees from two different divisions of The Portman Hotel [hereinafter referred to as THE PORTMAN] which employs approximately three hundred and fifty employees. Hearings on that petition, NLRB Case No. 20-RC-16191, were held during which THE PORTMAN introduced documentary and testimonial evidence regarding the functional integration and community of interest of all employees at THE PORTMAN. Some relevant evidence offered by THE PORTMAN was arbitrarily and capriciously excluded by the NLRB.

On March 30, 1988, Regional Director Robert H. Miller issued his Decision and Direction of Election finding that the appropriate unit at THE PORTMAN for collective bargaining purposes included:

All engineering subdivision employees and maintenance attendant employed by the Employer at its San Francisco, California facility; excluding all other employees, guards and supervisors as defined in the Act.

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<sup>1</sup> The Union was permitted to intervene in the case before the United States Court of Appeals for the Eleventh Circuit and was a party to the decision.

The unit was comprised of eight out of thirty employees from THE PORTMAN's Property Management Division and one of ninety employees from the Guest Room Services Division.

On April 11, 1988, THE PORTMAN petitioned the NLRB for review of the appropriateness of this unit. THE PORTMAN's request was denied without explanation by mailgram on April 27, 1988.

An election was held on April 27, 1988. On May 10, 1988, the Union was certified as the exclusive collective bargaining representative of said unit of employees.

Subsequently, the Union demanded that THE PORTMAN engage in collective bargaining with the Union over the unit. THE PORTMAN refused, as refusal was the only means to contest the Board's decision. The Board then issued an unfair labor practice complaint in NLRB Case No. 20-CA-21996 on June 21, 1988. On September 30, 1988, the NLRB granted the summary judgment motion of its General Counsel and issued its Order, requiring THE PORTMAN to bargain collectively with the Union over the unit.<sup>2</sup>

THE PORTMAN petitioned the United States Court of Appeals for the Eleventh Circuit in the most expeditious manner provided by law to seek review of the arbitrary and factually unsupported Order of the NLRB, pursuant to 29 U.S.C. § 160(f). Oral argument was held on August 8, 1989. On August 25, 1989, the panel hearing the case issued its decision granting enforcement of the NLRB's Order.

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<sup>2</sup> *The Portman*, 291 NLRB No. 45 (September 30, 1988).

## **GROUND ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED**

The Order granting enforcement of the Order of the NLRB was issued by the United States Court of Appeals for the Eleventh Circuit on August 25, 1989. (App. at A-1.)

The statutory provisions believed to confer upon this Court jurisdiction to review the judgment or decree in question by writ of certiorari are as follows: 28 U.S.C. § 1254 (1); 28 U.S.C. § 1651; 28 U.S.C. § 2101; 28 U.S.C. § 2106.

## **CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THIS CASE**

The constitutional provision involved in this case is the Fifth Amendment to the United States Constitution. The statutes involved in this case are the National Labor Relations Act, as amended, Sections 9(b) and 9(c)(5), 29 U.S.C. §§ 159(b) and 159(c)(5); and the Administrative Procedure Act, as amended, 5 U.S.C. § 706(2). The regulations involved are National Labor Relations Board, Rules and Regulations, Series 8, as amended, 29 C.F.R. § 102.64(a) and National Labor Relations Board, Statements of Procedure, Series 8, as amended, 29 C.F.R. § 101.20(c). These authorities are set out at Appendix A-2.

## **STATEMENT OF THE CASE**

This is a case involving the determination of an appropriate collective bargaining unit for THE PORTMAN, a unique luxury hotel in San Francisco, California.

The Union filed a representation certification petition seeking to represent nine out of approximately three hundred and fifty employees at THE PORTMAN.

THE PORTMAN's position is that only an "all-employee" unit is appropriate because of its unique people product design and the functional integration and community of interest of all employees. A splintered unit undermines the unique product and THE PORTMAN's ability to compete in the marketplace.

The Regional Director issued a Decision and Direction of Election finding appropriate a unit of nine employees from two different divisions of THE PORTMAN which coincide with the petitioned-for unit. The Board then conducted an election in that unit.

After enforcement of the NLRB's subsequent bargaining order by the United States Court of Appeals for the Eleventh Circuit, THE PORTMAN has petitioned this Court seeking issuance of a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review and set aside the NLRB's Order.

#### **Basis For Federal Jurisdiction**

The United States Court of Appeals for the Eleventh Circuit had jurisdiction to review and set aside the Order of the NLRB pursuant to Section 10(f) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(f).

## STATEMENT OF THE FACTS

### 1. THE PORTMAN, The Product — The Difference

THE PORTMAN is a unique luxury hotel which opened on September 2, 1987. THE PORTMAN employs approximately three hundred and fifty employees called associates who service approximately three hundred and forty guest rooms, one fine dining facility, a top floor club lounge and several thousand square feet of banquet and meeting space. THE PORTMAN is located in San Francisco, California, one of the most competitive luxury hotel cities in the world. R. 1331, 1524.<sup>3</sup>

This hotel was designed, financed, developed and managed by one man—John Portman. The world famous hotel architect and developer testified that he has attempted through THE PORTMAN to emulate the outstanding service experienced at three of the finest hotels in the world, The Mandarin and The Peninsula Hotel in Hong Kong and the Oriental Hotel in Bangkok, Thailand. R. 1521. Mr. Portman realized to bring an oriental product into an occidental culture would generate excessive labor costs because of the high employee per room ratio in the Orient versus the low employee per room ratio in America. R. 1521-25; 1334.

Mr. Portman recognized the need to produce a product different from the other luxury hotels in San Francisco in

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<sup>3</sup> "R." references are to the paginated transcripts of testimony, R. 1-1760, as well as to the paginated volume of record excerpts entitled "Volume IV Pleadings," R. 1761-2143. "PX." refers to THE PORTMAN's exhibits.

order to survive the intense, established, world-class competition. R. 1524.

Every employee at THE PORTMAN was selected based upon his or her intrinsic motivation to be friendly and to serve guests. The mission of Dr. Donald Clifton and his company, Selection Research, Incorporated [hereinafter referred to as SRI], was to select people who possessed affirmatively friendly attitudes to win guests over and get them to come back. R. 1668. SRI helps define what talents should be for a particular product or company, and then gleans those talents from a pool of applicants. R. 1681-82. Dr. Clifton and his staff reviewed and screened approximately nine thousand applicants to select over three hundred employees. R. 1672. SRI helped create the product at THE PORTMAN which is different from any luxury hotel. R. 1672-73.

John Portman explained the uniqueness of THE PORTMAN as follows:

Out of our experience, and we've designed projects for Carda Lumpur (ph), Jakarta (ph), Bangkok, Manila, Hong Kong and in China Hang Chow (ph) as well as Behjing (ph). But in our experience in Southeast Asia we did smaller hotels. In the United States, we've been primarily major convention hotels, Hyatt, Westin, Marriott. We saw what a small luxury type hotel could be from our experience in Southeast Asia and every year they have, through the ABA, the selection of three best hotels in the United States and all three of them are Asian hotels. They are the Peninsula, the Mandarin and the Oriental in Bangkok.



We were trying to understand why the American Bar Association responds this way year in and year out. What it really is is a combination of two things. A combination of not only the physical facility but it's a combination of the operation. They are much more guest oriented than we here in this country have been. So when we had the opportunity to develop this hotel here in San Francisco, I have always thought that creating a, if you create a great violin but no one knows how to play it or it's a poor player, bad music comes out and unless somehow you can pull those things together you couldn't begin to reach what the full potential was. So the exciting thing of what we've tried to do is as revolutionary as maybe the Atrium Hotel was in 1967 when it opened in Atlanta. But this goes far beyond that in that it not only involves where in the past everything has been separated into little slots, the design is one thing, the operation is another thing and this, we had an opportunity here to really instead of thinking in terms of segregation, think in terms of integration. Not only from the design of the physical facility but thinking in terms of how I would like to be treated as a guest and to move away from the commercial and institutional type facilities that most of our American hotels have developed into, very impersonal. Our service industries are suffering from a lack of concern for the consumer and it's not only in the hotel business, it's in everything. I could go on into what's happening in various industries which have similar kinds of problems, but what it really boils down to is that there's only one way to the future, to be competitive in the world that's evolving and that is to be interested and

concerned with quality and excellence and be interested in serving and interested in giving rather than receiving and not being cynical, believing in people and trying to make people's lives more beneficial.

It's really a people oriented kind of thing. So when it came to designing this hotel and creating the kind of operation and everything that we wanted to come together there, I wanted to think of it more as a home away from home, more residential, more friendly and that when the guest comes that the guest is treated as if a guest came into your home, into your own living room and how would you treat that person. Everything is driven from the human level, from the people level. It's not driven from any abstract level. It's not driven from any object oriented level. It's driven from the human level and what can we do in creating a new kind of concern, a new kind of interest and this kind of hotel that we have developed here would be very very hard to duplicate. There are probably very few cities in the world that could have a hotel like this because it is so unique. Maybe as time goes on that morays change and attitudes change, maybe the future might hold more of this but our whole approach was creating a team, creating a management team which really was a family. It's the hotel's family. And that each part of the family is respected as much as the next part. And that there is no we or they, there is nothing that anybody in the hotel can't do or won't do in a response to a problem from a guest point of view. So this whole philosophical approach which has a human base and we felt that to come into San Francisco at a time when everyone says that San Francisco is



over-built and doesn't need anymore hotel rooms, the last thing that would make any sense was to come in and put up another set of bedrooms and have another hotel just like any other hotel. So we saw this as a great opportunity for the first time in my career to be able to bring together and to mold not only the physical with operational and the whole ambiance, not only the physical ambiance but the human ambiance that would occur. That's the whole story behind the hotel.

R. 1521-24.

Q. BY MR. STOKES: Mr. Portman if you would please explain how the Property Management Division at the Portman Hotel operates?

A. We don't isolate. As a matter of fact we don't isolate anything from anything. This goes back to my statement about the difference between segregation versus integration. But we have for instance the hall porters, the stewards, the operating engineers, maintenance, in other words everything that really relates to the maintenance of the facility becomes a combined effort by all that participate in that activity. That is a unified activity and that activity overlaps. Consequently we felt that in order to carry out this particular operation in the way that we have seen from the standpoint of guest response, and it starts all the way from the driver at the airport to the doorman through everyone throughout the entire staff, it is that no one is isolated into any one specific thing. Everyone is there to serve. They may be asked to do something that might not fit a job description but they respond. They respond in a positive way and it's all oriented to guest satisfaction.

R. 1526.

## **2. THE PORTMAN's Organization**

All PORTMAN employees work under the same Vice President and Managing Director and Executive Operating Committee. There are ten divisions including numerous job classifications at THE PORTMAN. The Property Management Division has approximately thirty employees which includes engineers, lobby porters and stewards. The Guest Room Services Division has approximately ninety employees.

## **3. Community of Interest**

All employees of THE PORTMAN possess virtually the same interests and job characteristics throughout. All employees have individual contracts of employment with THE PORTMAN. The contracts of employment contain an employee bill of rights. PX 5. These unique employment documents also provide for a grievance procedure with binding arbitration. Every employee has his or her own business card.

All employees go through the same orientation program. All employees receive the same benefits. THE PORTMAN has an open-door policy that applies to all employees. Other benefits applying to all employees include: flex time, personal days, insurance, free meals in the employee cafeteria, family rates for using hotel facilities, free employee uniforms that are cleaned and maintained in the same manner, payday every Friday, quarterly employee evaluations, yearly employee evaluations, merit pay raise reviews and a \$500.00 per year educational reimbursement.

All employees complete the same paperwork in the hiring process. The same personnel manual applies to all employees. All employees have the same discount parking benefit. All are issued similar name tags. Insurance benefit packages are the same for all employees. All the rules and regulations in the personnel manual and associate's handbook apply to all employees. The same vacation rules apply to everyone. Holiday pay and leave of absence procedures are the same. Progressive disciplinary procedures apply to all employees. All employees use the associate entrance. THE PORTMAN pledge and mission statement apply to all employees. Only Pat Mene, THE PORTMAN's Vice President and Managing Director, has the authority to terminate an employee. *See generally* testimony of Joe Villa. R. 574-85, 612.

#### 4. Functional Integration

The substantial weight of the evidence confirms the functional integration of the Property Management engineering employees with other employees throughout THE PORTMAN.

Comptroller Mark Everton testified extensively regarding the functional integration and cross-utilization of employees throughout THE PORTMAN. He testified in part as follows concerning the difference between the Mobile five-star, Triple A five-diamond Four Seasons Clift Hotel and THE PORTMAN:

- Q. BY MR. STOKES: Did you come, did you become familiar with the so-called engineering employees at the Four Seasons Clift Hotel Mr. Everton?

- A. I was very familiar with them. While I was employed as the Assistant Comptroller I was responsible for overseeing all of the renovation work that had occurred at the Clift during my two years there. The two years that I was there we had renovated about two-thirds of the guest rooms in the building including the Redwood room which is the lounge there which hadn't been renovated for twenty-five years, also extensive renovation of the lobby and of the French Room which is the dining room and all of the meeting rooms. As part of my responsibilities I was in charge of placing out and receiving bids for all of the work that was consulted with the Engineering Department at the Clift, preparing all the purchase orders, which again was in conjunction with the Engineering Department. The Engineering Department, specifically the Chief Engineer was responsible for all of the actual supervision of the trades and outside contractors that were brought in. I was very closely involved with them in reviewing the financial aspects of the work that was done upon completion of the work.
- Q. How, if in anyway, would you compare the performance of the job duties of Engineering employees in the Property Management Division at the Portman?
- A. From what I've seen of the interaction I've had with the employees at both the Clift during the two years I was there and the Portman during the ten months I've been at the Portman, I see a few similarities but an overwhelming amount of dissimilarities in the way they go about doing their job.
- Q. Would you please elaborate on that sir?

- A. The Engineering Department at the Clift is a very isolated department. Their offices are down in the basement. They have their own separate locker room. They pick up their food from the cafeteria and take it into their own separate dining room and they have their own separate office, their own system of inter-office mail being delivered and picked up from their area. Work orders are put in a lock box that's attached to the outside of a gate that's locked, which is actually the access to the engineering area. They have their own showers and locker rooms. While at the Portman I frequently find myself in the men's room with Property Management employees, people performing engineering tasks. I find myself daily eating meals with them, either breakfast, lunch or dinner. I find myself spending a lot of time in hallways, in public areas, in elevators with Property Management people conducting engineering work.
- Q. Give us some specific examples of what you've observed at the Portman concerning the Engineering or Property Management Division associates performing their duties, vis-a-vis the performance of engineering employees duties at the Clift.
- A. The attitude or the focus of the staff at the Clift was one to maintain the plant. Unfortunately or fortunately the Clift itself is 70 years old and their primary focus was to keep the plant operating. Their job was to, I would guess, you could say their job was to fix the building. While at the Portman the concern is not the plant. The concern is for the satisfaction of the guests, for the safety and satisfaction of the associates. I would say that

their orientation at the Portman is more in line with fixing the guest and fixing the employees' workplace, the associates' workplace than it is fixing the plant.

Q. And give us an example of that sir?

A. I find that I am in the office quite late at night. I find that there is a Property Management engineer who visits the accounting office on rounds to walk through the office, to walk back into the computer room that's in the back of the accounting office and to inspect the computer equipment and the electrical back there, which I look at as primarily for the safety of myself and my staff. There's an extremely high voltage transformer back there and it's very important that someone is keeping an eye on that to maintain our safety.

I also have witnessed the Property Management engineers performing their duties as a part of the Life Safety Program at The Portman. Which again is in keeping with the safety of the guests and the safety of the associates. The Clift, the Life Safety Program is administered by the Manager on duty. Not due to the technical nature of the equipment, but due to the fact they feel that at the Clift the Assistant Manager, whose job is daily interaction with the guests, is more in tune with maintaining guest safety than it is to have one of the engineers looking out for guest safety. At the Portman we feel that guest safety can best be overseen by someone that's most familiar with the building and with where the guests are located. That would be one of the Property Management people.

I've also seen a lot of engineers or the Property Management engineers asking associates if ev-



everything is okay, if there is anything they can do for them. One of the policies at the Portman is that if you have a problem you may ask an engineer or a Property Management maintenance person if they can correct it for you at that point. If they are unable to do so then they'll ask you to fill out a work request that will then be routed through the office for scheduling. That would have been an impossibility at the Clift. You didn't talk to the engineers to ask them to hang a bulletin board or to try to unstick a lock or to try to fix a toilet. You went down to the basement and submitted a work order into the locked box on the outside of the locked cage to get them to do the job. Those are the major differences I see.

- Q. Have you come to observe, in the ten months that you've been at the Portman Hotel, employees or associates that are not in the Property Management Division doing work that at the Clift would be considered Engineering Department work?
- A. Most definitely. . . .
- Q. Have you ever seen anything like that at the Clift?
- A. On the contrary. What I found myself facing several times was initiating work I felt needed to be done and finding that I was in jeopardy of a grievance procedure. In my office at the Clift I was in need of some shelves. One Saturday I brought a drill and some molly bolts and some wall brackets and hung some shelving and was very proud of the job I had done hanging shelving. Unfortunately due to the threat of grievance I spent the next Sunday taking my shelving down because it had not been assembled by Property

Management or by Engineering personnel which is part of their contract and agreement.

R. 778-783, 785.

It is un rebutted that Property Management engineering employees regularly interact with, cross-utilize with, and are functionally integrated with all other employees of THE PORTMAN.

## ARGUMENT AND CITATION OF AUTHORITY

### Introduction

A court reviewing a unit determination decision determines whether the decision is arbitrary, capricious, an abuse of discretion, or lacking in substantial evidentiary support. Reviewing courts also decide questions of law. 5 U.S.C. § 706(2).

Where findings in support of a Board order are not supported by substantial evidence in the record considered as a whole, the Board order cannot be enforced. *See NLRB v. The Westin Hotel*, 738 F.2d 765 (6th Cir. 1984). Even where an administrative agency's decision is supported by substantial evidence, the decision cannot be arbitrary and capricious. *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 278 (1983).

In *NLRB v. The Westin Hotel*, *supra*, the Sixth Circuit reviewed a bargaining unit determination of maintenance department employees. The regional director had based his decision on:

the weight of the record evidence, particularly the unique skills possessed by the maintenance employees, their separate supervision, and the



paucity of a current area-wide pattern of bargaining or a broader unit basis.

*Id.* at 767.

Although the court acknowledged that the Board had considerable discretion in choosing from among a range of appropriate bargaining units, the court refused to enforce the Board's bargaining order because one factor, the Board's finding of a lack of a consistent area-wide pattern of bargaining in units larger than the maintenance department, was not supported by substantial evidence in the record considered as a whole. Rather, the prevailing pattern favored overall hotelwide units. *Id.* at 769.

The case before this Court represents two fundamentally competing considerations. One is the right of an American in a capitalistic society to create a unique people product specially designed to compete in a particular marketplace.

Another is the responsibility of a federal agency to make certain labor relations decisions in a wholly neutral manner based on its expertise and the facts before it that may affect that people product.<sup>4</sup>

John Portman is the American. He is a renowned architect, entrepreneur, and rebuilder of inner cities. THE PORTMAN is his product. In 1967, John Portman designed

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<sup>4</sup> In an exchange during oral argument Judge Fay asked the NLRB attorney, Mr. Hitterman, whether there was any set of facts which would justify an all-employee unit if not in this case. Mr. Hitterman's response for the Board was that an all-employee unit may never be appropriate. Such a rigid position is contrary to the Board's duty to make unit determinations on a case-by-case basis.

the Hyatt Regency in Atlanta and substantially altered the design of hotels throughout this country.

In 1987, John Portman created THE PORTMAN in San Francisco. This unique people product was based on the idea of bringing oriental service to a luxury hotel in the United States. In order to compete THE PORTMAN must provide oriental service with a much lower employee per room ratio than similar service in the Orient. This requires great flexibility with complete cross-utilization and function integration of all employees. The success of this endeavor depends on a cohesive interchangeable work force subject to the same personnel policies, practices and procedures.

The NLRB's decision must be based on substantial evidence in the record as a whole. In making unit determination cases in the hotel industry, the Board is to apply on a case-by-case basis the same general community of interest criteria used in other industries, including distinctions in skills and functions of particular employee groups, their separate supervision, *the employer's organizational structure* and differences in wages and hours, as well as *integration of operations*, and employee transfer, interchange, and contacts (emphasis supplied). All relevant criteria must be considered. See generally *ACL Corporation, d/b/a Atlanta Hilton and Towers*, 273 NLRB 87 (1984).

Are administrative agencies right when they are wrong? They are not. The NLRB must use its expertise to base unit determination decisions on the facts of each case. The NLRB may not abandon its neutrality and ignore the evidence in making unit determinations. A reviewing court has the duty to scrutinize each case closely and not defer

blindly to administrative agency decisions. It is not the role of courts to rubber stamp administrative proceedings that are erroneous. Unfortunately, the Eleventh Circuit abdicated its responsibility as a reviewing court in this matter by summarily affirming the NLRB's unit determination without addressing the important legal issues involved.

**A. The Unit Determination is not Supported by Substantial Evidence in the Record as a Whole.**

The Regional Director in the case at bar found an appropriate unit consisting of only: eight engineering employees within the Property Management Division (approximately thirty employees) and one maintenance attendant within the Guest Room Services Division (approximately ninety employees) of the hotel (the unit sought by the Union). R. 728, 1215.

The Regional Director disregarded the weight of the evidence and applicable law in concluding that this gerrymandered unit possessed a distinct community of interest.

The Regional Director's conclusion that THE PORTMAN's employees' assistance with each other's tasks is "incidental" and "reflects a spirit of cooperation or civility rather than an overlap of job functions" is not supported by the record evidence as a whole. A review of the record shows that the substantial evidence requires just the opposite conclusion. Nothing is "incidental" about it.

Cross-utilization and functional integration of employees are planned and required at THE PORTMAN. THE

PORTMAN's success depends upon providing qualitatively different service to guests. The guest comes first, and the task comes second. Employees do whatever task is at hand to service the guests. R. 304-06. The emphasis is on teamwork to get the job done. R. 433-34.

THE PORTMAN prohibits employees from using phrases such as "this is not my job." R. 446. Employees are required to do whatever is necessary to service the guests irrespective of job position. R. 473. Employees go beyond their traditional job classifications to get the job done. R. 767-68. Employees are willing and do perform a variety of tasks outside their traditional job classifications. R. 1030. This work ethic applies to engineering employees as well as others. R. 1154-55. Over a year was spent developing the organizational structure of the hotel that would permit it to compete successfully. R. 1339-40. Tasks get done to serve the guests, not waiting for the job to be performed by someone in the job classification who is assigned to do the particular tasks. R. 1433.

The record is replete with examples of all employees performing whatever tasks are at hand notwithstanding their job classification. Witnesses gave dozens of examples of engineering employees performing non-traditional engineering tasks and non-engineering employees performing traditional engineering tasks.

**B. The NLRB Arbitrarily and Capriciously Excluded Relevant Evidence That Could Have Materially Affected the Determination of an Appropriate Unit.**

The Board arbitrarily and capriciously refused to consider testimony from Professor Paul Gaurnier proffered by THE PORTMAN.<sup>5</sup>R. 1319-21. Professor Gaurnier is a former dean of the Graduate School of Hotel Administration at Cornell University and is a renowned expert concerning hotel operations and organization. He has taken tours with hotel executives who showed him operations data concerning the following hotels in San Francisco: The Fairmont, The Stanford Court, The Hilton, The Four Seasons Clift Hotel, The Donatello, The St. Francis, The Hyatt Regency, The Holiday Inn, the Handerly Motor Inn and THE PORTMAN. In particular, in preparation for his testimony, Professor Gaurnier toured THE PORTMAN, The Four Seasons Clift Hotel and The Stanford Court.

He was prepared to discuss the organizational structure of THE PORTMAN, how it relates to service, a comparison of THE PORTMAN's organizational structure with the Four Seasons Clift Hotel and The Stanford Court, and the effect the petitioned-for unit would have on THE

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<sup>5</sup> The Board's actions and decisions throughout the unit determination hearing were arbitrary and reflected that the Board abandoned its neutrality in this matter. One example is that counsel for THE PORTMAN discovered counsel for the Union and the hearing officer behind closed doors immediately after the close of evidence one day in an area where Board personnel had advised counsel for the PORTMAN not to go. Counsel for THE PORTMAN made a motion for the hearing officer to be recused because of the appearance of impropriety which was denied. R. 843-875.

PORTMAN's organizational structure and service (See generally THE PORTMAN's Appeal to Regional Director from Hearing Officer's Refusal to Admit Expert Testimony of Evidence of Professor Paul Gaurnier and Professor Gaurnier's 27-page affidavit as an offer of proof.)<sup>6</sup>

The Board clearly did not believe employment at THE PORTMAN was a prerequisite for admission of relevant testimony: Wilt Linier is Vice President of Engineering for Marriott Corporation. R. 1608. Dr. Donald Clifton is chairman and CEO of SRI. R. 1654.

Professor Gaurnier's testimony would not have been cumulative. He was not an employee of a hotel company. He was the only academic called to testify during the hearing. He is one of the foremost experts on hotel operations and organization in the United States. Professor Gaurnier is personally familiar with the organizational structure of several luxury hotels in San Francisco. The Board's action in excluding Professor Gaurnier's testimony is arbitrary and capricious in light of comparative evidence of other hotels received from: Robert Hydorn, Ralph Mork, Mark Everton, Spencer Scott, Larry Ott, Larry Sternberg, Michael Jump, Ben Balansag, Patrick Mene, Charles Lo, Scott McKibben and Wilt Linier.

The Board's action in excluding Professor Gaurnier's testimony was arbitrary, violative of its policies, and denied THE PORTMAN administrative due process. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 176-77 (1941); *Atlas Copco, Inc. v. Environmental Protection Agency*, 642 F.2d 458,

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<sup>6</sup> This pleading is part of THE PORTMAN's SUPPLEMENTAL APPENDIX at A-5.



467 (D.C. Cir. 1979); National Labor Relations Board, Rules and Regulations, Series 8, as amended, 29 C.F.R. § 102.64(a); National Labor Relations Board, Statements of Procedure, Series 8, as amended, 29 C.F.R. § 101.20(c). "The Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 fn.4 (1974).

The exclusion of Professor Gaurnier's testimony could have materially affected the outcome of the appropriate unit decision because there would have been undisputed expert testimony in the record that THE PORTMAN's organizational structure and flexibility are critical to the business purpose of the hotel and its ability to compete successfully in the San Francisco luxury hotel market.

**C. The NLRB Disregarded Established Policy by Ignoring THE PORTMAN's Organizational Structure and Business Purpose.**

The Regional Director approved the petitioned-for unit which took employees out of two separate hotel divisions thereby ignoring the hotel's organizational structure. The Board is required to consider the employer's organizational structure in making a unit determination. Generally, an employer wants a collective bargaining unit to coincide with the employer's organizational structure.<sup>7</sup> See *Atlanta Hilton*, *supra*. As Justice Stone noted in *Pittsburgh Plate Glass*, 313 U.S. at 176-77:

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<sup>7</sup> R. Gorman, BASIC TEXT ON LABOR LAW 69 (1976); C. Morris, THE DEVELOPING LABOR LAW 421 (2d ed. 1983).

As we are often reminded, most of the decisions of the Board involve discretion which is to be exercised by it alone and not the courts. For that reason the only substantial right of the litigant before the Board is, in most cases, the right to invoke the exercise of that discretion upon a full and fair consideration of all of the relevant evidence. . . . One of the most important safeguards of the rights of litigants and the minimal constitutional requirement in proceedings before an administrative agency vested with discretion, is that it cannot rightly exclude from consideration facts and circumstances relevant to its inquiry which upon due consideration may be of persuasive weight in the exercise of its discretion.

The Board has long held that "the manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees in the plant and is thus an important consideration in any unit determination." *International Paper Company*, 96 NLRB 295, 298 fn. 7 (1951).

The Board has specifically stated that the employer's business purpose is relevant in determining an appropriate bargaining unit. In *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962), the Board stated in pertinent part as follows:

In determining the appropriate unit, the Board delineates the grouping of employees within which freedom of choice may be given collective expression. At the same time it creates the context within which the process of collective bargaining must function. Because the scope of the unit is



basic to and permeates the whole of the collective bargaining relationship, each unit determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered.

In *Birdsall, Inc.*, 268 NLRB 186, 190 (1983), the Board after citing *Kalamazoo, supra*, with approval stated as follows:

Thus, in determining the unit appropriate for collective bargaining herein, a consideration of the various employee classifications or functions is incomplete without an analysis of how they interact within the Employer's operational scheme so as to carry out its business purpose. . . . Simply put, and as is clear from the above recitation of facts, the Employer's operation is highly integrated and adaptive . . .

Indeed, the factual reality of the Employer's operation compels a determination that a broader unit is appropriate. . . . it operates with a high degree of functional integration, including substantial interchangeability and contact among employees. As described above, the Employer's business purpose and operations require that employees be frequently shifted from one area to another on an ad hoc basis, and the promptness of the response to the Employer's quickly varying requirements is essential . . . it is the "as-needed" flexibility of the work force which is far more

operationally critical, and gives the Employer's business its distinctive character.

The Regional Director in this case ignored THE PORTMAN's organizational structure and the distinctive character of the hotel's operation in carving out an alleged appropriate unit. Pat Mene, THE PORTMAN's Vice President and Managing Director, took more than one year to develop the organizational structure of the hotel. R. 1339-40. The Property Management Division was organized as the group that cleans, repairs and maintains the hotel. R. 558-59. There is no separate engineering department. Included in this Division are engineering employees, stewards and lobby porters. The heads of the hotel's ten different divisions report to Mr. Mene. See PX. 30.

The Regional Director's unsubstantiated assertion that THE PORTMAN failed to show how a unit of only engineering employees will adversely affect the hotel's product and service is not supported by substantial evidence in the record considered as a whole. It ignores the testimonies of numerous witnesses of how separate engineering units in fact operate on a daily basis in luxury hotels in San Francisco.

It is undisputed that San Francisco has one of the most crowded and competitive luxury hotel markets in the world. THE PORTMAN can compete successfully only by offering service that is unique. THE PORTMAN has tried to create a niche by offering oriental service with a limited, affordable number of employees. Unlike oriental hotels that have a ratio of three or four employees per guest room, THE PORTMAN seeks to provide similar service with a work force ratio of roughly one employee per guest room. The

unique service depends upon a unified, completely integrated, team approach to guest service. All aspects of THE PORTMAN's employee relations, including: organizational structure, the recruitment and orientation process, personnel policies, practices and procedures, and functional integration so that all employees do whatever it takes to serve guests immediately, are coordinated to cultivate and nurture teamwork among employees that *does* distinguish THE PORTMAN from its competitors.

Establishing different terms and conditions of employment for certain employees will undermine THE PORTMAN's ability to maintain the level of teamwork essential to its success. *See generally* testimonies of John Portman R. 1521-24, Pat Mene R. 1331-56, Larry Sternberg R. 1099-1117 and Dr. Donald Clifton R. 1685, 1699-1700, 1702-03.

**D. The Extent of the Union's Organizational Success was the Controlling Factor in the Determination of An Appropriate Unit.**

There is no separate engineering department at THE PORTMAN. Engineering employees are part of the Property Management Division. There is no separate supervision of them by a chief engineer. Ralph Mork, their immediate supervisor, is the House Light and Power Supervisor. Michael Jump, Director of Property Management, has overall responsibility for engineering employees, lobby porters and stewards. There are no reported hotel unit determination cases where the Board has created a unit by taking employees from two different divisions and excluding other employees in those divisions from the unit, thereby ignoring the employer's organizational structure.

The hearing officer refused to allow counsel for THE PORTMAN to ask the Union's assistant business manager, Robert Hydorn, whether the Union petitioned for the unit based on the extent of its organizational success. R. 12-17. Counsel for the Union stated on the record that the Union petitioned for the same unit that it represents in other major hotels in San Francisco. R. 17 and 48. There had been no decision and direction of election regarding a petitioned-for unit of engineering employees in San Francisco prior to this case. R. 127-28.

The Union filed a petition to represent nine engineering employees at THE PORTMAN. The Union declined to commit as to what position it would take if the Regional Director found a different unit to be appropriate. R. 1756-57. In the Union's brief to the Regional Director the Union sought to represent the engineering employees and the Guest Room Services maintenance attendant. R. 1872. The unit designated by the Regional Director consisting of nine employees is the unit sought by the Union.

The conclusion is inescapable that the Regional Director's decision sought to preserve the Union's general bargaining unit in San Francisco, irrespective of the compelling facts in this case, THE PORTMAN's organizational structure and business purpose, and the Board's policy of a case-by-case analysis.

The extent of a union's organizational success shall not be controlling in making a unit determination. See *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 497 (1985); 29 U.S.C. § 159(c)(5). Where the extent of a union's organizational success is the controlling factor in the determination of an appropriate unit, a bargaining order will not be enforced. *Ramada Inns, Inc. v. NLRB*, 487 F.2d 1334 (9th Cir. 1973); *Westward Ho Hotel Co. v. NLRB*, 437 F.2d 1110 (9th Cir. 1971).

## CONCLUSION

This is not a case about management attempting to be non-union. This is a case about the ability and right of an entrepreneur to create and maintain a product. THE PORTMAN must have uniform personnel policies, practices and procedures for all employees, whether union or non-union, to maintain its unique product.

The NLRB is required to be wholly neutral in unit determination cases. The NLRB may not exclude relevant evidence, disregard relevant criteria and act in an arbitrary and capricious manner to satisfy a union's organizational interests. The findings of the Board are not supported by substantial evidence in the record considered as a whole. The NLRB's actions violated the administrative due process rights of THE PORTMAN. The purpose and intent of the National Labor Relations Act are frustrated and damaged by the NLRB's decision in this case.

For all of the foregoing reasons, arguments and authorities, it is respectfully submitted that this Court should grant the Petition of THE PORTMAN and issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review and set aside the NLRB's order.

Respectfully submitted,

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

**NO. 88-8746**

**NLRB No. 20-16191**

**THE PORTMAN,**

**Petitioner,  
Cross-Respondent,**

**versus**

**NATIONAL LABOR RELATIONS BOARD,**

**Respondent,  
Cross-Petitioner.**

**INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL NO. 39,**

**Intervenor.**

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**Petitions for Review of an Order of the National  
Labor Relations Board**

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**(August 25, 1989)**

**Before FAY and HATCHETT, Circuit Judges, and  
ALLGOOD\*, Senior District Judge.**

**PER CURIAM: ENFORCED. See 11th Cir. R. 36-1.**

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**\* Honorable Clarence W. Allgood, Senior U.S. District Judge for the  
Northern District of Alabama, sitting by designation.**



## **CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED**

### **U.S. CONSTITUTION**

**Amend V.** No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### **NATIONAL LABOR RELATIONS ACT**

**Section 9(b).** The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate



representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Section 9(c)(5). In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

#### **ADMINISTRATIVE PROCEDURE ACT**

Section 706. To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(2). Hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

### **NLRB RULES AND REGULATIONS**

**Section 102.64(a).** Hearings shall be conducted by a hearing officer and shall be open to the public unless otherwise ordered by the hearing officer. At any time, a hearing officer may be substituted for the hearing officer previously presiding. It shall be the duty of the hearing officer to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties under section 9(c) of the act.

### **NLRB STATEMENTS OF PROCEDURE**

**Section 101.20(c).** The hearing, usually open to the public, is held before a hearing officer who normally is an attorney or field examiner attached to the regional office but may be another qualified official. The hearing, which

is non-adversary in character, is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case. The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions. In most cases a substantial number of the relevant facts are undisputed and stipulated. The parties are permitted to argue orally on the record before the hearing officer.